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Products Liability
January 2005



Special Edition:

State Court Judge Refuses To Certify Class In Asbestos Medical Monitoring Case

Bourgeois v. A.P. Green, No. 488-642,
24th Judicial District Court, State of Louisiana (Judge Robert J. Burns
1/5/2005)

The curtain may have finally been drawn on this landmark case. Nine years ago three individuals formerly employed at Avondale Shipyard brought suit against Avondale, its executive officers, and various product manufacturers, suppliers and contractors claiming that they had been exposed to asbestos while working at Avondale and should now be “medically monitored” on a yearly basis for possible development of asbestos diseases. The plaintiffs brought the case both individually and as a proposed class action, the class to be composed of all Avondale employees who worked before 1976 and who had been “significantly exposed” to asbestos, but had no currently diagnosed asbestos disease. On January 5, 2005 the trial judge denied plaintiffs’ bid for class certification, holding that the plaintiffs had failed to carry their burden of proving that the case should be handled as a class action.

The case began with a fight as to whether Louisiana law even recognized such a cause of action, with the defendants asserting that plaintiffs who did not have disease had not been damaged. The trial court and the Louisiana Fifth Circuit Court of Appeal agreed with the defendants, but the Louisiana Supreme Court disagreed and, following the majority of states that had considered the issue, held that plaintiffs could pursue the establishment of a court-supervised medical monitoring program provided they satisfied seven legal requirements.

The Louisiana Legislature reacted quickly by passing a law specifically stating that medical monitoring did not constitute “damage” unless the plaintiff suffered from a current manifest injury. The Legislature specified that the law would be retroactive and would apply to pending cases. However, in a further development in the *Bourgeois* case, the Louisiana Supreme Court struck down the retroactivity provision finding it unconstitutional. Thus, “medical monitoring” without physical injury remains a valid remedy in Louisiana for exposures to alleged hazardous substances that occurred before the effective date of the statute in 1999.

The case remained dormant for a time, but was finally brought to a class certification hearing in July 2004. After briefing, rebriefing and oral argument, Judge Robert Burns denied the plaintiffs’ motion for class certification giving oral reasons for judgment on January 5, 2005.

Louisiana’s class action law parallels federal procedure. In order to proceed as a class action, plaintiffs bear the burden of proving certain requirements. A core requirement, against which all other requirements are measured, is a class definition based on objective criteria – one which easily permits a determination of class membership.

Judge Burns found that the plaintiffs had not established a viable class definition, primarily because their definition stated that class membership would be based upon “significant exposure” to respirable asbestos fibers at Avondale. Citing expert testimony introduced at the class certification hearing, Judge Burns concluded that no one could say with certainty what “significant exposure” was, and a lay person would not be able to tell based upon that amorphous term whether or not he was a class member.

Judge Burns also found that individual questions would outweigh common questions, and that therefore, there would be no economy to handling the case as a class action. A series of mini-trials

would have to be conducted for each potential class member to determine whether the individual had been significantly exposed, and, if so, which defendants or third party defendants were responsible. Quoting from Viacom's brief he stated, "The case at bar is really no different than the average asbestos personal injury case, except that the remedy sought, medical monitoring, is the same for each plaintiff." Judge Burns expressed great concern over the practicalities of how the court would handle such a burden and ultimately decided that it would be more efficient for individuals who felt aggrieved to file individual claims.

Other class certification requirements found lacking by Judge Burns included the typicality of the class representatives' claims, and the adequacy of the proposed representatives to represent absent class members. The only requirement that Judge Burns conceded to plaintiffs was the requirement of numerosity – that the proposed class members were so numerous as to make their individual joinder in the action impractical. Even as to this requirement, Judge Burns remarked that he was doubtful, because of testimony introduced by the defendants at the class certification hearing that in other medical monitoring cases there has been little public response or interest, even when monitoring is offered free of charge.

The court's decision to deny class certification leaves this as an action by three individual plaintiffs requesting yearly x-rays and pulmonary function tests for the foreseeable future. We will continue to keep our readers updated on this case should an appeal ensue.

- *Madeleine Fischer*

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